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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOVENCIO DELA CALZADA, Defendant and Appellant.	A133098 (Contra Costa County Super. Ct. No. 5-100469-6)

Defendant Jovencio Dela Calzada appeals from a judgment sentencing him to 173 years to life imprisonment following his conviction by a jury of 18 counts of sex and related offenses against two stepdaughters. He contends the trial court improperly precluded him from asking hypothetical questions of an expert witness and that his trial counsel was ineffective in two respects. Although the restriction placed on the examination of the expert witness was unjustified, we are satisfied that no prejudice resulted and that there is no merit to the claim that counsel was ineffective. We shall therefore affirm the judgment.

Background

By an amended information, defendant was charged with respect to Jane Doe II with multiple counts of lewd acts on a child under 14 (Pen. Code, § 288, subd. (a)),[1] forcible lewd acts on a child under 14 (§ 288, subd. (b)(1)), lewd acts on a child 14 or 15 more than 10 years younger than defendant (§ 288, subd. (c)(1)), forcible rape of a child

[1] All statutory references are to the Penal Code unless otherwise noted.

under 14 more than 10 years younger than defendant (§ 269, subd. (a)(1)), forcible penetration with a foreign object of a child under 14 more than 10 years younger than defendant (§ 269, subd. (a)(5)), and oral copulation of a minor (§ 288a, subd. (b)(1)), all occurring at various times between May 1997 and December 2000. With respect to Jane Doe I, defendant was charged with three counts of lewd acts on a child under 14 in 1999 and 2000 (§ 288, subd. (a)) and one count of making criminal threats in December 2004 (§ 422). Most counts also alleged that the offenses were committed against more than one victim. (§ 667.61, subds. (b), (c), (e).)[2]

The two victims are two of defendant's three stepdaughters who were initially raised in the Philippines and moved to the United States in May 1997 after their mother married defendant. At the time Jane Doe II was 13, Jane Doe I was four, and the third sister, Renzel, was 16.

In view of the limited nature of the issues raised on appeal, it is not necessary to set out the evidence at trial in any detail. In short, Jane Doe II described a course of conduct in which defendant at first offered her money to massage him, threatened to send her back to the Philippines if she told her mother, engaged in various sex acts with her including intercourse and oral copulation, and had sex with her "[p]robably more than 50 times" although she was "sure it's more than that." When Jane Doe II turned 17 she told Renzel of this conduct, and at Renzel's insistence told her mother. Her mother, however, insisted that this conduct not be reported to the authorities, and Jane Doe II and Renzel soon moved out of the family home. In December 2004, while in the Caribbean, Jane Doe II received a phone call from Jane Doe I, who "was crying, sobbing, sound[ing] scared." Concerned about her sister and over her mother's objections and threats to kill herself, Jane Doe II contacted child protective services. Upon returning to California she reported her prior experiences with defendant to a police detective.

[2] It was also alleged that the prosecution was commenced by the issuance of an arrest warrant for defendant in November 2005 and that defendant was out of state between January 6 and April 19, 2005, and between July 16, 2005 and September 21, 2009.

Jane Doe I testified to having observed defendant on top of Jane II, who was not wearing pants, and then to numerous experiences of her own with defendant between the time she was in kindergarten until she was 11 years old. On many of these occasions defendant groped and touched Jane Doe I's vagina over her clothes. Jane Doe I reported some of these incidents to her mother, who discouraged her from mentioning the incidents to others at the risk of being placed in a foster home. Defendant told Jane Doe I that he would deport her if she disclosed his actions. Her call to Jane Doe II in the Caribbean was prompted by a threat from defendant to kill her by cutting her throat and throwing her off a bridge. After she described to Renzel what had been occurring, she was interviewed by a police officer and a social worker, and then placed in a foster home.

Defendant testified that he had never molested or had sex with either of his daughters. His natural daughter and son both testified that they had never been molested by their father or observed him engaging in inappropriate behavior with others. The defense also called Dr. Lee Coleman, a "medical doctor specializing in adult and child psychiatry." Dr. Coleman testified that the recollection of all witnesses is greatly influenced by the manner and content of prior questioning and by the neutrality, or lack thereof, of those who have questioned them. In response to the prosecutor's objection, defense counsel was prohibited from asking Coleman hypothetical questions based on facts testified to in this case.

The jury found defendant guilty on all counts and that there was substantial sexual conduct on eight of the counts. Defendant was sentenced to an aggregate prison term of 173 years to life, and timely noticed an appeal.

Discussion

I. *Prohibiting hypothetical questions based on the facts in the case was erroneous but non-prejudicial*

Defendant contends that the trial court erred in prohibiting him from asking hypothetical questions of his expert, Dr. Coleman, based on assuming facts to which witnesses had testified at trial. Before Dr. Coleman testified, the court ruled that counsel "can ask him to describe all the factors that relate to [memory, suggestibility, and

questioning techniques], but you can't put it in terms of, If this, what's your conclusion? Because that's just a shorthand [way] of saying, 'Do you think that these people are telling the truth or not?' " Towards the conclusion of Dr. Coleman's testimony, the court reaffirmed its ruling: "The court believes that under the appellate decisions that I have read, hypothetical questions simply ask the jury to – they're really equivalent to asking the witness to opine on the outcome of the case, imposes on the province of the jury, and that you do allow testimony, generally, as to good practices and bad practices for the purpose of determining credibility. But it's general. [¶] The jury has to make the actual decision based upon the facts of this case. You can't [have] Professor X or Officer X come in and tell us how . . . they should decide the case, that's what the court seems to hold and that was my ruling."

Subsequent to the trial in this case, our Supreme Court has made clear that this is not the rule. (*People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*).) In *Vang* the Supreme Court held that the Court of Appeal had "erred in condemning hypothetical questions because they tracked the evidence in a manner that was only 'thinly disguised.' 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.]' [Citation.] . . . [¶] Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence . . . .' [Citations.] . . . ' "The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." ' [Citation.] . . . But, however much latitude a party has to frame hypothetical questions, the questions must be rooted in the evidence of the case being tried, not some other case. [¶] The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Id.* at pp. 1045-1046.)

Citing Evidence Code section 805, the court went on to point out that "expert testimony is permitted even if it embraces the ultimate issue to be decided." (*Id.* at p. 1049.)[3]

Thus, the restriction imposed by the court in this case unquestionably was unjustified. The Attorney General attempts to defend the court's ruling by asserting that counsel made an insufficient offer of proof. We disagree. Counsel advised the court, "I was planning to ask hypotheticals concerning how the allegations were disclosed, the conversation that (Jane Doe I) had with her older sister, (Jane Doe II), prior to any conversations with [Child Protective Services] CPS or [Children's Interview Center] CIC. [¶] And I was also going to ask the doctor hypotheticals based on some of the statements made by (Jane Doe I) during the course of the CIC interview. He was going to opine that the reliability of such statements would be caused — would be an issue, that there's a likelihood of suggestibility involved considering the people that (Jane Doe II) talked to prior to speaking with law enforcement. [¶] And he would also testify to — concerning the neutrality of the CIC interview concerning — or specifically, concerning some of the statements (Jane Doe I) made during the course of the CIC interview." While this offer was not as specific as it might have been, in the context of the proceedings it is apparent that counsel expected to elicit from Dr. Coleman, for example, that assuming the sisters had spoken with the people and in the manner described by the witnesses it is likely that their recollections were influenced by those conversations and interrogations and that their testimony years after the alleged incidents therefore was unreliable. In ruling, the court did not suggest that more specificity was necessary to evaluate the propriety of particular hypothetical questions but that no hypothetical questions based on the evidence would be permitted. The propriety of this ruling was adequately preserved for appeal.

Nonetheless, although the court's restriction was improper, we agree with the Attorney General's further argument that the error was harmless. Although counsel was

[3] Evidence Code section 805 reads: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of the fact."

precluded from making his point with hypothetical questions, he was not precluded from eliciting the expert's opinion on how one's memory of past events may be affected by subsequent conversations and interrogations. Dr. Coleman testified, for example, "the way you ask the question can influence profoundly the answers and profoundly influence the beliefs of the person you're asking the questions of so that they can – you can alter the person's beliefs, and then their answers can further, in subsequent questions, be based on what they have come to believe based on the way you've done the questioning." Asked whether he was referring only to questioning by law enforcement personnel he responded, "No, it's not just law enforcement. [¶] . . . [¶] Anybody else that's questioning the child. In other words, potential influences are not going to be present or absent depending on who the person is so much as the fact that the interaction takes place. So that you could have maybe actually appear a friend could influence somebody. But more frequently, a family member, like an adult who, because of their opinion about maybe a person who is getting accused, or genuinely worried about the welfare of the child, they may be questioning the child in such a way that conveys the concern that this child is being abused. [¶] But of course, in cases that we had studied, that means it got to officials, agencies, so then there would be subsequent questions. And those questioning could be a teacher. It could be a principal. It could be a school counselor. It could be a police officer. It could be a nurse or a doctor at a medical facility. It could be interviewers who are specially set up to interview children once those initial – the case is reported, or some combination of all those." Asked "What about people in foster homes?" he responded, "Oh, yes, no question that could happen there, as well."

Defense counsel went on to ask, "How does memory work based on your experience?" to which Dr. Coleman responded: "Well, where you need to start with that question is how it doesn't work because so many people might overlook it. Memory doesn't work like a recording device where you experience something, you record it, store it away, and then you retrieve it. [¶] How it works is that you experience something, but . . . what you save interacts with other things that happen subsequently, so that . . . what you now believe you're remembering, depending on passage of time, the way you

think about it, maybe the way other people have asked you about it, can be anything from something that really you didn't experience at all to something that you had some experience, but it's been, to some degree, altered because of the way you've been asked about it. [¶] But the critical thing to understand is that if it's been altered or created, the person won't know that. It will feel to them exactly the same as a memory which is an accurate, complete reflection of what they did experience."

Asked what kind of influence would cause a child to have a false or mistaken memory of an event, Dr. Coleman testified, "If a person or persons that they're talking to has an opinion about something and feels clear in their mind about it, and they interact with the child, then the child can easily begin to adopt what it is the person around them believes and then try to give information which would fill in the details. [¶] . . . [¶] . . . But in my opinion, there is a very profound problem of lack of neutrality in the professionals who are doing the interviews." "Based on watching, I'd estimate about 2000 hours of watching videotapes or listening to audio tapes in cases of a child that has possibly been abused, by police officers, social worker, or somebody of that type, I believe there is a very profound lack of neutrality in most of them, if not – almost all of them, which in the direction of questioning a child in a way which would seem to be based on an assumption from the beginning that the child was molested."

Further on, the following colloquy ensued:

"Q. Would it be important to know to whom a child who is claiming sexual abuse has spoken before an official investigation has begun"

"A. I think it's very crucial, yes.

"Q. Why?

"A. Because if you don't study who else has been talking to the child, and to the extent that you can, how they have been talking to the child, then you're compromised in your ability to study the meaning of what you get from the child in your interview."

This testimony and more provided the basis for defense counsel to argue, and the jury to find, that the victims' testimony in this case could not be trusted to accurately

convey their experiences with defendant. The jury was apprised of those with whom the two sisters spoke, including their mother, sisters, and the police officers and social workers who had been contacted concerning potential child abuse. The tape recording of a January 6, 2005 interview of Jane Doe I at the Children's Interview Center was played for the jury. Given the details and consistency in the testimony of the prosecution's witnesses, it is highly improbable that any increased emphasis that hypothetical questions might have added to Dr. Coleman's testimony would have persuaded the jury that the victims' description of repeated molestation by defendant reflected only suggestions implanted in their memory by others and not what they had experienced. Jane Doe II, for example, described defendant dragging her across the living room to the master bedroom where he inserted his finger into her vagina and engaged in intercourse, threatened to send her back to the Philippines if she told her mother, and forced her to have sex "probably more than 50 times" and to orally copulate him "at least 20 times;" she related her disclosure of defendant's conduct to her older sister Renzel and to her mother and her mother's insistence that the conduct not be reported to the authorities. Jane Doe I described not only observing defendant on top of her sister without pants on one occasion but the details of several groping incidents of herself. Renzel confirmed portions of the testimony of both sisters, including the contemporaneous reports she had received from them, their mother's directions to Jane Doe II and herself to move out of the house when they complained of defendant's conduct, and enticements and threats by defendant and their mother to drop the molestation charges once made. There is no likelihood that hypothetical questions addressed to Dr. Coleman would have affected the findings that the two sisters were the victims of defendant's molestation and not deluded into imagining experiences that never occurred.

II. *There was no prejudicial ineffective assistance of counsel*

Defendant also contends that his attorney provided ineffective assistance in two respects. First, he cites the attorney's failure to move for a mistrial or new trial after the court, in response to his apparent objection at sidebar, advised the jury to disregard the

testimony of the social worker who first interviewed Jane Doe I that she had described the alleged touching in sufficient detail for him "to determine there is a high likelihood she had been molested and that her adult sister (Jane Doe II) had also been molested in the past." Second, he refers to the attorney's failure to object on confrontation clause grounds to the admission of the notice sent to defendant by Contra Costa County Children's and Family Services advising him that a report naming him as a suspected child abuser had been "substantiated."

In order to establish that he was prejudicially deprived of effective assistance of counsel, defendant must establish both that his attorney's performance fell below an objective standard of reasonableness and that the result of the proceedings probably would have been more favorable absent the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668.) Defendant has done neither. The record does not disclose the reasons for counsel failing to do what defendant argues he should have done, or that there can be no satisfactory explanation. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Counsel obtained an instruction from the court to disregard the objectionable portion of the social worker's statement. The statement did not disclose any underlying facts for which there was no evidence before the jury, but only the social worker's inadmissible opinion. The danger of the inability to "unring the bell" thus was not present and counsel may well have felt that the court's instruction was sufficient to cure the problem. The attorney also moved to redact the portion of the notice to defendant indicating that the report of suspected child abuse was substantiated, but this request was denied. Assuming, without deciding, that the notice included a testimonial statement within the meaning of the confrontation clause cases such as *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the failure to object on this ground may well have reflected the attorney's concern that if an objection on this ground were sustained, a live witness might be called whose testimony would be more damaging. In all events, it is highly doubtful that excluding any of this evidence would have had an effect on the outcome of the case. From the very fact of the prosecution, it was apparent that the authorities had concluded that the claims of molestation were substantiated. The objectionable statements did no more than confirm

that fact. They added no additional evidence and there is no likelihood that they affected the outcome of the case. Nor was there any cumulative prejudice from all of the asserted errors that defendant raises on appeal.

Disposition

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.